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March 10, 2021

Submitted Electronically via <https://foiaonline.gov/>

Freedom of Information Officer
Environmental Protection Agency
1200 Pennsylvania Avenue NW (2822T)
Washington, DC 20460

Re: Animal Feeding Operation Air Emissions

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW).

FWW and its members have a strong interest in information related to the Environmental Protection Agency's (EPA) efforts to develop Emission Estimating Methodologies (EEMs) for animal feeding operations (AFOs) and begin regulating AFO air pollution under the Clean Air Act (CAA) and other applicable laws. FWW is a national, non-profit, membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. Industrial livestock pollution is one of FWW's priority issues, and it is engaged in several campaigns to reduce AFO pollution nationally through stronger regulation, transparency, and enforcement.

Records Requested

Pursuant to FOIA, FWW requests copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, (hereinafter records), relating to EPA's National Air Emissions Monitoring Study (NAEMS) and EEM process for AFOs. Unless otherwise stated, FWW is only requesting records and communications dated on or after September 19, 2017 through the date of production. FWW specifically requests the following:

1. All records, including all communications, shared or otherwise maintained in connection with EPA's EEM development process between EPA staff and persons or organizations involved in the EEMs process, including but not limited to:

- The SAB Animal Feeding Operations Emission Review Panel, including individual members;
 - Purdue University staff, including but not limited to NAEMS Science Advisor Albert Heber;
 - The Agricultural Air Research Council or any of its members or representatives;
 - The Agricultural Air Quality Task Force or any of its members or representatives;
 - Industry organizations representing AFOs and CAFOs, including but not limited to the National Chicken Council, the American Farm Bureau Federation, and the National Pork Producers Council;
 - Attorneys, lobbyists, or other representatives of the livestock industry or specific livestock interest groups;
 - Owners and operators of participating AFOs;
 - Citizens or organizations inquiring about the EEMs process.
2. All internal EPA communications related to the NAEMS or AFO EEM development process.
 3. All records, including all communications, dated on or after August 13, 2019, related to EPA's effort to implement the five corrective actions recommended by OIG on pages 23 and 26 of the September 19, 2017 Report entitled "Eleven Years After Agreement, EPA Has Not Developed Reliable Emission Estimation Methods to Determine Whether Animal Feeding Operations Comply with Clean Air Act and Other Statutes."
 4. All records, including all communications, related to EPA's planned "stakeholder review period" and/or public engagement and comment process for any draft EEMs, including any records related to EPA's decision not to solicit comments on the draft swine EEMs published in August 2020.
 5. Studies, summaries, or reports created from or related to the EEM process, not including the 2013 SAB Report and 2017 OIG Report and related documents available on EPA's website.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, FWW asks that you disclose responsive records as they become available to you. FWW also asks that you prioritize the search for and release of records related to requests 3 and 4.

Claims of Exemption from Disclosure

If you regard any requested records or portions of records as exempt from disclosure under FOIA, FWW asks that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial. In accordance with the minimum requirements of your due process, this information should include:

1. Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and
2. Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups such as FWW access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW satisfies the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government

Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government,” 40 C.F.R. § 2.107(l)(2)(i), because the request relates to EPA’s records and communications concerning the EPA EEM process, the status of EPA’s NAEMS data analysis, the OIG Report, and EPA’s responsibilities to regulate AFO emissions. Any final methodologies will impact the EPA’s and states’ ability to characterize emissions exposure in rural communities and regulate AFO emissions under the CAA and other laws.

Factor 2: The disclosure is “likely to contribute” to understanding of federal government operations or activities

Disclosure is “likely to contribute” to an “increased public understanding” of EPA’s operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because such disclosure will enable FWW and the public to understand the status of EPA’s EEM development process, how EPA has and has not acted to implement the recommendations of the OIG Report, and the factors affecting EPA’s decision-making process as the Agency moves forward with the EEMs process for AFOs. Pursuant to the OIG Report, EPA agreed to implement five corrective actions by September 30, 2018, which included determining what, if any, EEMs could be developed given the scientific and statistical data gaps in the NAEMS study, taking steps to end civil enforcement amnesty for any emission sources or pollutant combinations for which EEMs could not be developed, and notifying the public about the status of the EEMs process. Other than recently posting a timeline for the release of certain EEMs on the EPA website, EPA has not updated the public on its decision-making process concerning whether to abandon or move forward with the development of certain EEMs given the inadequacy of the NAEMS study, or any steps it has taken to end civil enforcement amnesty. The requested information will contribute to the public’s understanding of EPA’s efforts to implement these recommendations, and consequently, allow the public to better understand current and anticipated AFO regulatory responsibilities under the CAA and other laws. Additionally, the requested records will also contribute to the public’s understanding of whether and to what extent EPA plans to engage in a robust public comment process for any draft EEMs that are released.

This information is not already accessible through EPA’s websites. See Factor 4, below. Moreover, EPA’s activities related to NAEMS and AFO EEMs are not currently clear to the public because of uncertainty arising from the OIG Report and EPA’s increasingly long timeline for establishing AFO EEMs. The requested information is critical to gaining an understanding of these EPA operations and activities.

Factor 3: The disclosure will contribute to “public understanding” of EPA’s operations and activities

The disclosure will contribute to “public understanding” of the subject of the request because it will contribute to the understanding of a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is “whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.”).

FWW will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons. It will do so in ways that effectively contribute to the public’s understanding. FWW is a membership organization with a staff of approximately 115, including researchers, organizers, attorneys, and communications professionals. FWW has scientific and legal expertise and our staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to

the media and the public on environmental issues. FWW frequently uses FOIA records and other public data to draft and issue policy-based reports, issue briefs, fact sheets, and blog posts related to AFOs, air pollution, and other issues of public interest. *See*

<http://www.foodandwaterwatch.org/library>. FWW has a long history of analyzing federal government AFO data, specifically, and making it available to the public. For example, FWW recently published an updated Factory Farm Nation report that uses USDA Economic Research Service, National Agriculture Statistics Service, Bureau of Labor Statistics and EPA data to track the expansion and environmental impact of the industrial livestock industry across the nation. *See* <http://www.foodandwaterwatch.org/insight/factory-farm-nation-2020-edition>. Moreover, FWW works to provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health. Factory farm water and air pollution is one of FWW's focal issues and FWW has developed expertise on these issues. Because of our expertise in this area, FWW is well-positioned to analyze the records we receive pursuant to this request and evaluate whether EPA's current course of action will result in adequate EEMs.

In addition to being able to analyze the information provided to determine whether EPA's actions are adequate for development of EEMs, FWW has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). FWW is well-positioned to provide plain-language analysis of these documents and effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels. These channels include: traditional media outlets; FWW's website, Facebook pages, other social media outlets, and newsletter; FWW webinars; press releases; blog posts; presentations at community meetings and conferences attended by rural citizens impacted by AFO pollution, environmental attorneys and advocates, journalists, and other interested members of the public; and emails to some or all of FWW's hundreds of thousands of supporters. FWW's work on AFO pollution and EPA regulation of AFOs has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, and other state and local outlets across the country, demonstrating FWW's ability to reach interested members of the public with the requested information. Further, FWW is well-known to interested members of the public and to other organizations with interested members as a national leader on issues related to AFO pollution, which facilitates FWW's dissemination of information to this audience.

Factor 4: The disclosure is likely to contribute "significantly" to public understanding of EPA activities

The public's understanding of government operations or activities related to EPA's EEMs process "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because FWW, our coalition partners, and interested members of the public know little about EPA's response to the OIG Report or about the current status of the EEM process, including whether EPA has addressed gaps in NAEMs data to develop adequate EEMs, which if any EEMs have been abandoned, to what extent the public will be able to engage in comment on draft EEMs during the proposed "stakeholder review period," and whether any steps have been taken to end civil enforcement amnesty, public understanding of these efforts will undoubtedly be enhanced to a

significant extent by disclosures in response to this request. The EEM process will have a defining impact on air quality protections for rural communities across the United States. Those communities living near AFOs are directly affected and particularly interested in EPA's decision-making process surrounding the development of EEMs, but the public at large will also benefit from insight into the EEM process.

None of the records requested are currently available on EPA's website, elsewhere on the Internet, or have been previously published by EPA. As a result, interested members of the public are currently largely in the dark regarding EPA's activities to develop EEMs and regulate AFO air pollution. The requested records have significant informative value, and will meaningfully increase transparency with regard to EPA's decision-making process concerning the development of EEMs for AFOs.

As discussed above, FWW is experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, FWW is able to ensure that the increase in public understanding of EPA's development of EEMs for AFOs will be significant.

Requirement 2: Disclosure is not primarily in the commercial interest of the Requester

Factor 1: FWW has no commercial interest in obtaining the information

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two factors must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester[s]." 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as a nonprofit organization, FWW has no commercial, trade, or profit interest in the material requested. FWW will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

Factor 2: Disclosure is not "primarily in the commercial interest of the requester"

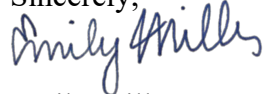
The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). FWW's sole interest in obtaining the requested information is to broaden public understanding of EPA's decision-making process concerning the development of EEMs for AFOs. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's decision-making process concerning the development of EEMs for AFOs, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, FWW will not be responsible for those costs. FWW reserves the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (646) 369-7526 or eamiller@fwwatch.org.

Thank you in advance for your prompt reply.

Sincerely,


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